Supreme Court U.S.
FILED

No. 06A557

06-930 NOV 11 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

HAROON RASHID,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Andrew B. Reid
Attorney for Haroon Rashid
1439 Court Place
Denver, Colorado 80202
Telephone: 303.825.5400
Facsimile: 303.623.2101
Email: areid@waltergerash.com

Counsel for Petitioner

QUESTION PRESENTED

As a question of law, was legal permanent resident alien Petitioner's conviction of third degree misdemeanor assault an "aggravated felony" for the purpose of deportation under Section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

TABLE OF CONTENTS

QUESTION PRESENTED.....i
TABLE OF CONTENTS.....ii
TABLE OF AUTHORITIES.....ii
OPINION BELOW.....1
STATEMENT OF JURISDICTION.....1
RELEVANT STATUTES.....1
STATEMENT OF THE CASE.....2
ARGUMENT.....3
Introduction to the Question Presented.....3
There Is a Conflict Among the Circuit Courts As to Whether A Misdemeanor Assault Is An Aggravated Felony.....5
CONCLUSION.....8
APPENDIX.....10

TABLE OF AUTHORITIES

CASES

Alaka v. Attorney General, 456 F.3rd 88, 94-95 (3rd Cir. 2006).....3
Chrzanoski v. Ashcroft, 327 F.3d 188 (2nd Cir. 2003).....4
Cruz-Garcia v. Ashcroft, 396 F.3d 1125 (10th Cir. 2005) ..7,8,12,18
Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003).....6
Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1948).....8
Francis v. Reno, 269 F.3d 162 (3rd 2001).....3,4,6,7
Guerro-Perez v. INS, 242 F.3d 727 (7th Cir. 2001).....6
INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).....7
Khalayleh v. INS, 287 F.3d 978 (10th Cir. 2002).....3
Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 277, 160 L.Ed.2d 271 (2004) 3
Lopez v. Gonzales, 549 U.S _____, 127 S.Ct. 625 (2006) 8
Rashid v. Gonzales, 2006 WL 2171522 (10th Cir. 2006).....1,4,5
Sing v. Gonzales, 432 F.3d 533 (3rd 2006).....6
Sing v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004).....4,6

Taylor v. United States, 495 U.S. 575, 600 (1990).....3
United States v. Christopher, 239 F.3d 1191 (11th Cir. 2001).....6
United States v. Gonzales-Tamariz, 310 F.3d 1168 (9th Cir. 2002)..6
United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001).....6
United States v. Graham, 169 F.3d 787 (3rd Cir. 1999).....6
United States v. Pacheco, 225 F.3d 148 (2nd Cir. 2000).....6
United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005).....4
United States v. Ponce-Casalez, 212 F.Supp.2d 42 (D.R.I. 2002)...6
United States v. Rodriguez-Rojo, 175 Fed. Appx. 982,
2006 WL 979303 (10th Cir. 2006).....5
United States v. Saenz-Mendoza, 287 F.3d 1101 (10th Cir. 2002).....5
United States v. Villegas-Hernandez, ____ F.3d ____,
2006 WL 3072558 (5th Cir. 2006).....4,5,6
United States v. Villanueva-Gaxiola, 119 F.Supp.2d 1185
(D.Kan. 2000).....6
United States v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002).....6
Wireko v. Reno, 211 F.3d 833 4th Cir. 2000).....6

FEDERAL STATUTES & REGULATIONS

8 U.S.C. section 1252(a)(2)(C).....3
8 U.S.C. section 1252(b)(1).....3
8 U.S.C. section 1101(a)(43)(F).....1,4,6,7,8
8 U.S.C. section 1227(a)(2)(A).....2
8 U.S.C. section 1227(a)(2)(A)(iii).....1,3
18 U.S.C. section 16.....1,4,5,6,8
28 U.S.C. section 1254(1).....3
8 C.F.R. section 1003.1.....3
8 C.F.R. section 1003.3.....3

STATE STATUTE

Colorado Revised Statutes 18-1.3-501.....2,4
Colorado Revised Statutes 18-3-204.....2,4

OTHER

S.Rep. No. 225 (1983).....7

OPINION BELOW

The opinion of the Tenth Circuit of Appeals is reported as *Rashid v. Gonzales*, 190 Fed.Appx. 676, 2006 WL 2171522 (10th Cir. 2006).

STATEMENT OF JURISDICTION

A panel of the Tenth Circuit entered its decision denying a petition from a final deportation order of the Board of Immigration Appeals on August 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTES

8 United States Code section 1227(a)(2)(A)(iii) provides:

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 United States Code section 1101(a)(43)(F) provides:

> As used in this chapter ...[t]he term "aggravated felony" means ...a crime of violence (as defined in section 16 of Title 18 ...) for which the term of imprisonment at least one year ....

18 United States Code section 16 provides:

> The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or

> property of another may be used in the course of committing the offense.

Colorado Revised Statutes section 18-3-204 provides:

> A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person .... Assault in the third degree is a class I misdemeanor ....

Colorado Revised Statutes section 18-1.3-501 provides:

> Class I [:] Minimum Sentence [-] Six months imprisonment, or five hundred dollars fine, or both[;] Maximum Sentence [-] Eighteen months imprisonment, or five thousand dollars fine, or both.

STATEMENT OF THE CASE

Petitioner, Haroon Rashid, is a native and citizen of Pakistan and was admitted into the United States in 1997 as a lawful permanent resident. He resides in Colorado with his American wife and American-born minor children.

On March 13, 2003, after being taunted because of his ethnic background, Mr. Rashid was involved in a physical altercation in which he and the other person received minor scrapes. Mr. Rashid was charged with a single count of misdemeanor third degree assault. Colorado Revised Statutes section 18-3-204. This was his first offense of any kind. Mr. Rashid was convicted of the charge on March 17, 2004. A sentence was imposed of 35 days in jail (401 days with 366 days suspended).

As a result of this misdemeanor conviction, on April 21, 2004, the Department of Homeland Security placed Mr. Rashid in removal proceedings charged as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A). On November 29, 2004, the Immigration Judge ordered the removal of Mr. Rashid.

Mr. Rashid filed a timely appeal to the Board of Immigration Appeals on December 2, 2004. See, 8 C.F.R. § 1003.3. The Board had jurisdiction of the underlying removal appeal pursuant to 8 C.F.R. § 1003.1. The Board issued its final decision dismissing the appeal on April 14, 2005. A timely petition was filed by Mr. Rashid in the Court of Appeals on May 12, 2005. See, 8 U.S.C. § 1252(b)(1).[1] On August 3, 2006, a panel of the Tenth Circuit entered judgment denying the petition for review from a final decision of the Board of Immigration Appeals. The petition for Writ of Certiorari was initially filed by mail with this Court on November 1, 2006.[2] The jurisdiction of this Court additionally rests on 28 U.S.C. § 1254(1).

ARGUMENT

Introduction to the Question Presented

When evaluating whether an offense is an aggravated felony, the Court presumptively applies the categorical approach established in *Taylor v. United States*, 494 U.S. 575, 602, 110 S.Ct. 2143 (1990). This approach prohibits consideration of evidence other than the statutory definition of the offense, thus not taking into account the particular facts underlying a conviction. *Leocal v. Ashcroft*, 543 U.S. 1, 11, 125 S.Ct. 277, 160 L.Ed.2d 271 (2004).

8 U.S.C. section 1227(a)(2)(A)(iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission is

---

[1] Although there is a jurisdictional bar to the review of a final order of removal, 8 U.S.C. § 1252(a)(2)(C), the Court of Appeals and this Court have jurisdiction to determine the applicability of the jurisdictional bar and whether the Petitioner's conviction was an "aggravated felony." *Alaka v. Attorney General*, 456 F.3d 88, 94-5 (3rd Cir. 2006); *Francis v. Reno*, 269 F.3d 162, 165 (3rd 2001); *Khalayeh v. I.N.S.*, 287 F.3d 978 (10th Cir. 2002).

[2] On November 7, 2006, the Court ordered the reformatting of the attachments to the petition for writ of certiorari and granted a 60-day extension of time from that day for the re-filing of this petition. A stay of deportation was issued by Justice Stephen G. Breyer on December 6, 2006, pursuant to Supreme Court Rule 23.

deportable.". An "aggravated felony" is defined at 8 U.S.C. section 1101(a)(43)(F):

> As used in this chapter ...[t]he term "aggravated felony" means ...a crime of violence (as defined in section 16 of Title 18 ...) for which the term of imprisonment at least one year ....

Thus, the definition has two requirements (1) a crime of violence as defined by 18 U.S.C. section 16, and (2) a term of imprisonment of at lease one year. The offense for which Mr. Rashid was convicted, third degree misdemeanor assault, has a maximum sentence of 18 months, although Mr. Rashid was sentenced to a term of actual imprisonment of only 35 days. Colorado Revised Statutes (C.R.S.) sections 18-1.3-501 and 18-3-204.

A "crime of violence" is then defined by 18 U.S.C. section 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Tenth Circuit properly determined that the statutory language of Colorado's third degree assault statute does not necessarily include the use or threatened use of physical force and concluded, therefore, that it is not a crime of violence under § 16(a). *Rashid v. Gonzales*, 190 Fed.Appx. 676, 2006 WL 2171522, **2 (10th Cir. 2006); C.R.S. 18-3-204; *see also*,; *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196-7 (2nd Cir. 2003); *Francis v. Reno*, 269 F.3d 162, 171-2 (3rd Cir. 2001); *United States v. Villegas-Hernandez*, ____ F.3d. ____, 2006 WL 3072558 (5th Cir. 2006); *Sing v. Ashcroft*, 386 F.3d 1228, 1234 (9th Cir. 2004); and *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005).

The Tenth Circuit panel then considered § 16(b) and held that, as a matter of law, third degree misdemeanor assault met that section's requirements for an "aggravated felony." *Rashid*, 2006 WL 2171522, **3. Secti 6(b) also has two requirements. First, the offense must be a "fel , and, second, the offense must involve a substantial risk that physical force against a person or property may be used in the course of the offense. *Vellegas-Hernandez*, ____ F.3d ____, 2006 WL 3072558 (each requirement must be independently satisfied). The Circuit Court found that § 16(b) was ambiguous and looked beyond the statute to particular facts underlying the conviction to determine whether the offense of third degree assault involved a substantial risk of physical force. *Rashid*, 2006 WL 2171522, **2-3. It is there that the Circuit Court erred because it overlooked the first requirement and did not need to reach the second.

There Is a Conflict Among the Circuit Courts As to Whether A Misdemeanor Assault Is An Aggravated Felony

In its argument before the Immigration Judge and the Board of Immigration Appeals, the Respondent Government contended that the Colorado misdemeanor third degree assault offense by law constitutes a "felony" within the meaning of federal "crime of violence" definition under 18 U.S.C. § 16(b) because the misdemeanor offense is potentially punishable by more than one year. In order for the Board of Immigration Appeals and then the Tenth Circuit panel to reach the second requirement of § 16(b), they also had to agree with the Government's argument. Two previous Tenth Circuit decisions have also held that a misdemeanor offense that is punishable by more than one year is a "felony" for the purposes of the Immigration and Nationality Act (INA). *United States v. Rodriguez-Rojo*, 175 Fed. Appx. 982, 2006 WL 979303, **2 (10th Cir. 2006) (regarding a Texas offense) and *United States v. Saenz-Mendoza*, 287 F.3d 1101, 1103-4 (10th Cir. 2002) (regarding a Utah offense).

The Tenth Circuit's decisions follow opinions from other Circuits which have similarly held that misdemeanor offenses punishable by more than one year are felonies under the INA.

United States v. Pacheco, 225 F.3d 148, 154-55 (2nd Cir. 2000); *United States v. Graham*, 169 F.3d 787, 792 (3rd Cir. 1999); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Urias-Escobar*, 281 F.3d 165, 167-68 (5th Cir. 2002); *United States v. Gonzales-Vela*, 276 F.3d 763, 767-68 (6th Cir. 2001); *Guerro-Perez v. INS*, 242 F.3d 727, 734-37 (7th Cir. 2001); *United States v. Gonzales-Tamariz*, 310 F.3d 1168, 1170-71 (9th Cir. 2002); and *United States v. Christopher*, 239 F.3d 1191, 1193-94 (11th Cir. 2001). However, these opinions almost uniformly relied upon the preliminary provision, 8 U.S.C. § 1101(a)(43), and failed to make the detailed analysis of 18 U.S.C. § 16(a) and (b) as expressly directed by § 1101(a)(43).

In direct contrast to these decisions, where the language of § 16(b) has been compared with that found in § 16(a), Circuit courts have ruled that Congress meant what it said - that misdemeanor convictions may be felonies under § 16(a) if they possess the required element, but are categorically excluded from the definition of an aggravated felony under § 16(b). *Sing v. Gonzales*, 432 F.3d 533, 538 (3rd 2006); *Francis*, 269 F.3d at 168-69 (3rd Cir); *Villegas-Hernandez*, ___ F.3d ___, 2006 WL 3072558 (5th Cir.); *Flores v. Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003); *Singh*, 386 F.3d at 1231, n. 3 (9th Cir); *see also*, *United States v. Ponce-Casalez*, 212 F.Supp.2d 42, 44-46 (D.R.I. 2002); *United States v. Villanueva-Gaxiola*, 119 F.Supp.2d 1185, 1190 (D.Kan. 2000).

As the Third Circuit stated in *Francis*:

> ...Congress did not use the term "felony" in § 16(a). Rather, § 16(a) is narrowly drawn to include only those crimes whose elements require the "use, attempted use, or threatened use of physical force." Although § 16(b) is specifically limited to felonies, it does not include all felonies. It is limited to those felonies that "by [their] nature involve[s] a substantial risk that ...force ...may be used." Clearly, Congress intended to include felonies and misdemeanors under subsection (a), but only intended certain felonies to be included under subsection (b)."

Francis, 269 F.3d at 168.

The *Francis* Court then recognized the discussion in the Senate Report for the Comprehensive Crime Control Act of 1984 that makes this clear:

> ...The term "crime of violence" is defined, for purposes of all Title 18 U.S.C. in Section 1001 of the Bill... The term means an offense - *either a felony or a misdemeanor* - that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or any felony* that, by its nature, involves the substantial risk that physical force against person or property may be used in the course of its commission. S.Rep. No. 225 (1983).

Francis, 269 F.3d at 169 (emphasis in opinion). The Court also notes the purpose in recognizing the state categorization of the offense as a misdemeanor or felony:

> Thus, by relying upon state law to provide the categorization, we eliminate the redundancy that would otherwise result from including both a maximum of one year imprisonment under § 1101(a)(43)(F) and the condition precedent of "felony" in § 16(b) that is expressly incorporated in § 1101(a)(43)(F).

Francis, 269 F.3d at 170.

This interpretation is consistent with the rule of lenity embodied in the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290, 150 L.Ed.2d 347 (2001); *Francis*, 269 F.3d at 170.

> We resolve the doubts in favor of that construction because deportation is a drastic measure

> and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).[3]

CONCLUSION

This is an issue of law arising out of the undue reliance of certain circuits upon the language of 8 U.S.C. § 1101(a)(43)(F) without engaging in a proper analysis of 18 U.S.C. §16. As discussed above, the decision of the Tenth Circuit below, as well as decisions of other Circuits, are in direct conflict those Circuits which have conducted a proper analysis and have reached the rule that 18 U.S.C. § 16(b) categorically excludes state misdemeanors from the definition of "aggravated felony."

For these reasons, the Petitioner respectfully requests this Court accept the Writ and resolve this important and recurring matter.

---

[3] Following the initial filing of this petition, on December 5, 2006, the Court issued its opinion in *Lopez v. Gonzales*, 549 U.S _____, 127 S.Ct. 625 (2006), in which it affirmed a strict and narrow application of the definition of "aggravated felony" and noted the overreaching of the Government in extending the definition to misdemeanor offenses in deportation proceedings.

Wherefore, Petitioner, Haroon Rashid, respectfully submits his Writ of Certiorari this 2nd day of January, 2007.

Andrew B. Reid
Attorney for Haroon Rashid
1439 Court Place
Denver, Colorado 80202
Telephone: 303.825.5400
Facsimile: 303.623.2101
Email: areid@waltergerash.com

APPENDIX

Rashid v. Gonzales, 2006 WL 2171522 (10th Cir. 2006) (reformatted)

In re Haroon Rashid, No. A46 188 443, Board of Immigration Appeals (April 14, 2005) (reformatted)

In the Matter of Haroon Rashid, No. A46 188 443, Order of the Immigration Judge (November 29, 2004) (reformatted)

In the Matter of Haroon Rashid, No. A46 188 443, Oral Decision and Order of the Immigration Judge (November 29, 2004) (reformatted)

190 Fed.Appx. 676, 2006 WL 2171522 (C.A.10)

United States Court of Appeals,
Tenth Circuit

Haroon RASHID, Petitioner,
v.
Alberto R. GONZALES, United States Attorney General, Respondent.

No. 05-9535.

Aug. 3, 2006.

*677 Jim Salvator, Lafayette, CO, for Petitioner.
Mark C. Walters, Jonathan F. Potter, United States Department of Justice, Office of Immigration Litigation, Mario R. Ortiz, Immigration & Naturalization Service, Melissa Neiman-Kelting, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC, for Respondent.

Before KELLY, BRISCOE, and LUCERO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

PER CURIAM.
***1** Petitioner Haroon Rashid, a lawful permanent resident of the United States and a native and citizen of Pakistan, was placed in removal proceedings based on his conviction in a Colorado state court for third degree assault. Respondent asserted that this conviction was a "crime of violence," as defined by 18 U.S.C. § 16, which subjected Mr. Rashid to removal under 8 U.S.C. §§

1227(a)(2)(A)(iii) and 1101(a)(43)(F). An Immigration Judge (IJ) determined that the third degree assault conviction was not a crime of violence, and terminated the removal proceedings. Respondent appealed. The Board of Immigration Appeals (BIA) reversed and remanded to the IJ for the ministerial purpose of receiving into the record various documents pertaining to the assault conviction. The IJ then supplemented the record and ordered Mr. Rashid removed to Pakistan, pursuant to the BIA's order. In a subsequent appeal to the BIA, the BIA ordered Mr. Rashid deported.[FN1] Mr. Rashid filed a timely petition for review by this court. The BIA denied Mr. Rashid's subsequent motion to reconsider.

FN1. The BIA characterized the IJ's decision as ordering Mr. Rashid removed based on his third degree assault conviction. This is inaccurate, given the IJ's original order terminating the removal proceedings. In his order after the first remand, the IJ ordered Mr. Rashid removed because the BIA directed him to.

We have jurisdiction to determine if Mr. Rashid is removable "by reason of a criminal offense listed in [§ 1227]." *Tapia Garcia v. INS*, 237 F.3d 1216, 1220 (10th Cir.2001). We deny the petition for review.

Scope and Standard of Review

Respondent bears the burden in removal proceedings to prove by clear and convincing**678* evidence that the alien is subject to removal. 8 U.S.C. § 1229a(c)(3)(A); *Schroeck v. Gonzales*, 429 F.3d 947, 952 (10th Cir.2005). Because the BIA did not adopt any reasoning of the IJ, we review only the BIA's orders. *Krastev v. INS*, 292 F.3d 1268, 1275 (10th Cir.2002). In doing so, we review de novo the BIA's determinations of questions of law. *Fernandez-Vargas v. Gonzales*, 394 F.3d 881, 884 (10th Cir.2005), *aff'd* --- U.S. ----, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006). We are not, however, "at liberty to search for grounds to affirm that were not relied upon by the agency." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1205 (10th Cir.2006).

Statutory Framework

The issue is whether Mr. Rashid is removable based on his

conviction for third degree assault, in violation of Colo.Rev.Stat. § 18-3-204. Under 8 U.S.C. § 1227(a)(2)(A)(iii), an alien is subject to removal if he was convicted of an aggravated felony. In turn, 8 U.S.C. § 1101(a)(43)(F) includes in the definitions of "aggravated felony" the term "crime of violence," as defined in 18 U.S.C. § 16. Accordingly, we must evaluate the BIA's determination that Mr. Rashid's Colorado third degree assault conviction was a "crime of violence" under § 16.

The term "crime of violence" means-

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**2 18 U.S.C. § 16.

The third degree assault statute provides:

A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon.

Colo.Rev.Stat. § 18-3-204.[FN2]

FN2. Pursuant to the statute, this crime is a class 1 misdemeanor, but because Mr. Rashid was sentenced to 401 days' incarceration, *see* R. at 65, the BIA characterized the conviction as a felony under federal law. Mr. Rashid does not challenge this ruling.

Categorical Approach

When evaluating a conviction under § 16, "we are to use the 'categorical approach,' under which a court must only look to the statutory definition, not the underlying circumstances of the crime." *United States v. Lucio-Lucio*, 347 F.3d 1202, 1204 (10th Cir.2003)

(quotation omitted). If we determine, however, that § 16 is ambiguous, or broad enough to encompass a spectrum of crimes, some of which would and some of which would not constitute a "crime of violence," we can look beyond the statute to certain records of the prior proceeding to determine whether the jury was actually required to make findings relevant to our analysis. *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). More specifically, we may look at "the charging paper and jury instructions" to determine whether they "actually required the jury to find all the elements of [the crime] in order to convict the defendant." *Id.*; *see Shepard v. United States*, 544 U.S. 13, 23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Analysis

We first consider whether the third degree assault conviction was a crime of ***679** violence under § 16(a) ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). This court has determined that "the statutory language of Colorado's third degree assault statute does not necessarily include the use or threatened use of 'physical force.' " *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir.2005). In *Perez-Vargas*, we evaluated the Colorado statute in the context of the federal sentencing guidelines, specifically U.S.S.G. § 2L1.2.[FN3] *Id.* at 1287. The sentencing guideline at issue in *Perez-Vargas*, § 2L1.2, is almost identical to 18 U.S.C. § 16(a). *Id.* at 1286 n. 3; *accord United States v. Torres-Ruiz*, 387 F.3d 1179, 1187 (10th Cir.2004) (stating "2L1.2 defines the phrase 'aggravated felony' by effectively incorporating the definition of 'crime of violence' found in 18 U.S.C. § 16"). "A prior conviction for third degree assault in Colorado ··· is not categorically a crime of violence under USSG § 2L1.2." *Perez-Vargas*, 414 F.3d at 1287. Accordingly, we conclude that Mr. Rashid's conviction for third degree assault is not categorically a crime of violence under § 16(a).

FN3. "Crime of violence" includes "any offense under federal, state or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, Application Note 1(B)(iii).

We next turn to the question of whether Mr. Rashid's prior conviction is categorically a crime of violence under § 16(b) ("any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). Section 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

***3* In the criminal-sentencing context, this court has held that "a Colorado third degree assault is categorically a crime of violence under U.S.S.G. § 4B1.2(a)." *United States v. Krejcarek*, 453 F.3d 1290 (10th Cir.2006) (citing *United States v. Paxton*, 422 F.3d 1203, 1207 (10th Cir.2005)).[FN4] But we have not held that third degree assault categorically is a crime of violence under § 16(b). There is a "significant difference" between § 4B1.2's requirement of a "risk of physical injury," and § 16(b)'s requirement of a "risk of use of force." *United States v. Moore*, 420 F.3d 1218, 1224 (10th Cir.2005). "Without a distinction between crimes that potentially involve violent conduct and crimes that merely involve the possibility of resulting harm, the § 16(b) definition would be far too inclusive...." *Lucio-Lucio*, 347 F.3d at 1206; *see also id.* at 1207 (noting and preserving distinction between § 16(b) and § 4B1.2(a)(2), which is "obviously broader than § 16(b)"; limiting holding to cases not involving actual injury to others). Accordingly, the actual conduct that is criminalized must be considered when applying § 16(b).

FN4. "Crime of violence" refers to an offense that "(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another." U.S.S.G. § 4B1.2(a).

Looking beyond the statute of conviction, the BIA reasoned, and we agree, that "jury instructions 8 through 12 reflect that [Mr. Rashid] offered a self-defense theory at trial, and two of those instructions discuss the use of physical force." ***680** *In re Rashid*, No. A46 188 443, 2005 WL 3802089 (BIA Dec. 1, 2005) (unpublished). In particular, Instruction No. 9 stated:

It is an affirmative defense to the crime of assault in the third degree that the defendant used physical force upon another person:

1. in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by the victim, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose.

However, the defendant was not justified in using physical force if:

1. with intent to cause bodily injury to another person, he provoke[d] the use of unlawful physical force by that other person, or

2. he [was] the initial aggressor, except that his use of physical force upon another person under the circumstances [was] justifiable if he [withdrew] from the encounter and effectively communicate[d] to the other person his intent to do so, but the latter nevertheless continue[d] or threaten[ed] the use of unlawful physical force, or

3. the physical force involved [was] the product of a combat by agreement not specifically authorized by law.

R. at 148.

By returning a guilty verdict to the charge of third degree assault, the jury, which we presume followed the jury instructions, necessarily rejected Mr. Rashid's affirmative defense that he used physical force against the victim to defend himself. In doing so, the jury necessarily had to find that Rashid "was not justified in using physical force" for one of the three reasons outlined in the instruction quoted above. We conclude that any of these three reasons would be sufficient to satisfy the requirements of § 16(b), i.e., all three indicate that the crime/situation involved a substantial risk that Rashid would use, or did in fact use, physical force against the victim.

Conclusion

***4* We conclude that Mr. Rashid's prior conviction under the Colorado third degree assault statute was a crime of violence, as defined in 18 U.S.C. § 16. Consequently, his removal is warranted pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(F). The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A46 188 433 – Aurora Date: April 14, 2005

In re: HAROON RASHID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patrick C. Hyde, Esquire

ON BEHALF OF DHS: Donald C. O'Hare
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony as defined in section 101(a)(43)(F), I&N Act [8 U.S.C. § 1101(a)(43)(F)]

APPLICATION: Termination of Removal Proceedings

ORDER:

PER CURIAM. We affirm the Immigration Judge's November 29, 2004, decision ordering the respondent removed from the United States as an alien convicted of an aggravated felony on the basis of his March 2004 Colorado conviction for the offense of third-degree assault. The seventh jury instruction submitted in connection with the respondent's prosecution, entered into the administrative record as part of Group Exh. 2, reflects that the respondent was charged with (and convicted of) causing injury to

another by means of knowing or reckless conduct, and not negligent conduct. As the Colorado courts have held, the elements of assault are "'an unlawful attempt coupled with a present ability to commit a *violent* injury on the person of another.'" *People v. Cardwell*, 510 P.2d 317, 322 (Colo. 1973) (emphasis added) (quoting *Haas v. People*, 394 P.2d 845 (Colo. 1964)). For the reasons stated in our decision of November 8, 2004, we conclude that this offense qualifies as a crime of violence under either subsection of 18 U.S.C. § 16. The respondent presents no argument on appeal that would cause us to reconsider this determination. Accordingly, the appeal is dismissed.

s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
AURORA, COLORADO

FILE: A 46 188 443

IN THE MATTER OF:	)	
	)	
HAROON RASHID	)	IN REMOVAL PROCEEDINGS
	)	
RESPONDENT	)	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11-29-04. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the oral decision will be transcribed and will become the official decision in this case.

X The respondent was order removed to PAKISTAN.

The respondent's application for voluntary departure was granted until _____ with an alternate order of removal to _____, or in the alternative to _____. A bond of $_____ is required to be posted within five business days.

Voluntary departure will be under safeguards of the Department of Homeland Security.

The respondent's application for voluntary departure was denied and he/she was ordered removed to _____, or in the alternative to _____.

Respondent's application for _____ was:

granted.
denied.
withdrawn.
pretermittted.
other _____

Other _____.

11-29-04 s/ J P Vandello
(Date) J.P. Vandello
Immigration Judge

Appeal waived.
X Appeal reserved by Resp.. Appeal deadline is 12-29-04.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Aurora, Colorado

FILE: A 46 188 443 November 29, 2004

In the Matter of)
HAROON RASHID) IN REMOVAL PROCEEDINGS
Respondent)

ORAL DECISION AND
ORDER OF THE IMMIGRATION JUDGE

The facts of this case are borne out in the Oral Decision which was issued on a previous date. The Board of Immigration Appeals reviewed that decision and overruled it, finding that the respondent was in fact convicted of an aggravated felony; that assault in the third degree under Colorado statutes is a crime of violence, and since a one-year sentence was imposed, it is considered an aggravated felony under the definition section of 101(a)(43) of the Act.

The Board remanded the case so that the conviction document could be put in the record. It is now in the record as Exhibit

2.

IT IS ORDERED that the respondent be removed to Pakistan.

s/ J P Vandello
JAMES P. VANDELLO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JAMES P. VANDELLO, in the matter of:

HAROON RASHID
A 46 188 443
Aurora, Colorado

is an accurate, verbatim, transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for this file of the Executive Office for Immigration Review.

/s Susanne Trimmer

Susanne Trimmer, Transcriber

[filed 2005 FEB – 3 PM 2:32]

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

January 3, 2005
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

No. 06-930

In the Supreme Court of the United States

HAROON RASHID, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 18 U.S.C. 16(b), an offense is a "crime of violence" if it "is a felony" and "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The question presented is whether an offense is a "felony" under that provision if, although it is punishable by more than one year of imprisonment, it is classified as a "misdemeanor" under state law.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942) 8
Akinwunmi v. *INS*, 194 F.3d 1340 (10th Cir. 1999) 6
Alberto-Gonzalez v. *INS*, 215 F.3d 906 (9th Cir. 2000) .. 12
Alyas v. *Gonzales*, 419 F.3d 756 (8th Cir. 2005) 6
Berrior-Barrera v. *Gonzales*, 460 F.3d 163 (1st Cir. 2006) 6
Capric v. *Ashcroft*, 355 F.3d 1075 (7th Cir. 2004) 6
Clingman v. *Beaver*, 544 U.S. 581 (2005) 7
Cooper Indus., Inc. v. *Aviall Servs., Inc.*, 543 U.S. 157 (2004) 7
Evans v. *Chavis*, 126 S. Ct. 846 (2006) 7
Fernandez-Bernal v. *Attorney Gen.*, 257 F. 3d 1304 (11th Cir. 2001) 6
Flores v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003) 13
Foster v. *INS*, 376 F.3d 75 (2d Cir. 2004) 6
Francis v. *Reno*, 269 F.3d 162 (3d Cir. 2001) 10
Gandziami-Mickhou v. *Gonzales*, 445 F.3d 351 (4th Cir. 2006) 6

Cases–Continued: Page

Guerro-Perez v. *INS*, 242 F.3d 727 (7th Cir. 2002) 13
Jerome v. *United States*, 318 U.S. 101 (1943) 8
Lopez v. *Gonzales*, 127 S. Ct. 625 (2006) 9
Ortega-Mendez v. *Gonzales*, 450 F.3d 1010 (9th Cir. 2006) 13
Singh v. *Gonzales*, 432 F.3d 533 (3d Cir. 2005) 13
South Fla. Water Mgmt. Dist. v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) 7
Small v. *United States*, 544 U.S. 385 (2005) 9
Smith v. *United States*, 508 U.S. 223 (1993) 7
Sterkaj v. *Gonzales*, 439 F.3d 273 (6th Cir. 2006) 6
United States v. *Burston*, 159 F.3d 1328 (11th Cir. 1998) 8
United States v. *Christopher*, 239 F.3d 1191 (11th Cir.), cert. denied, 534 U.S. 877 (2001) 13
United States v. *Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001) 13
United States v. *Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002), cert. denied, 538 U.S. 1008 (2003) 13
United States v. *Graham*, 169 F.3d 787 (3d Cir.), cert. denied, 528 U.S. 845 (1999) 8, 12, 13
United States v. *Pacheco*, 225 F.3d 148 (2d Cir. 2000), cert. denied, 533 U.S. 904 (2001) 11, 13
United States v. *Page*, 84 F.3d 38 (1st Cir. 1996) 8
United States v. *Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) 8, 9
United States v. *Saenz-Mendoza*, 287 F.3d 1011 (10th Cir.), cert. denied, 537 U.S. 923 (2002) 13

Cases–Continued: Page

United States v. *Urias-Escobar*, 281 F.3d 165 (5th Cir.), cert. denied, 536 U.S. 913 (2002) 8, 13
United States v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) 13
United States v. *Williams*, 504 U.S. 36 (1992) 7
Wang v. *Ashcroft*, 260 F.3d 448 (5th Cir. 2001) 6
Wireko v. *Reno*, 211 F.3d 833 (4th Cir. 2000) 13
Xie v. *Ashcroft*, 359 F.3d 239 (3d Cir. 2004) 6
Zara v. *Ashcroft*, 383 F.3d 927 (9th Cir. 2004) 6
Zhong v. *Gonzales*:
No. 02-4882 (2d Cir. Jan. 17, 2007) 6
461 F.3d 101 (2d Cir. 2006) 6

Statutes, regulation and rule:

7 U.S.C. 2024(b)(1) 9
7 U.S.C. 2024(c) 9
8 U.S.C. 1101(a)(43) 10
8 U.S.C. 1101(a)(43)(B) 9, 12
8 U.S.C. 1101(a)(43)(F) 2, 10, 11, 12
8 U.S.C. 1252(d)(1) 5, 7
15 U.S.C. 1245(b) 11
18 U.S.C. 1(1) (1982) 8
18 U.S.C. 16 11
18 U.S.C. 16(a) 10, 11
18 U.S.C. 16(b) ..... *passim*
18 U.S.C. 25(b) (Supp. IV 2004) 11
18 U.S.C. 521(c)(2) 11

Statutes, regulation and rule–Continued: Page

18 U.S.C. 751(a) 9
18 U.S.C. 842(p) 11
18 U.S.C. 922(g)(1) 9
18 U.S.C. 924(e)(2)(B) 9
18 U.S.C. 931(a) (Supp. IV 2004) 11
18 U.S.C. 1952(a) 11
18 U.S.C. 1956(a) 11
18 U.S.C. 1959(a) 11
18 U.S.C. 2261(a) 11
18 U.S.C. 3156(a)(3) 9
18 U.S.C. 3559 8
18 U.S.C. 3559(a) 8
18 U.S.C. 3592(c)(2) 9
18 U.S.C. 3592(c)(10) 9
21 U.S.C. 802(44) 9
21 U.S.C. 841(b)(7)(A) 11
22 U.S.C. 2714(e)(3) 9
28 U.S.C. 540A(c)(1) 9
29 U.S.C. 186(d)(1) 9
29 U.S.C. 186(d)(2) 9
49 U.S.C. 31301(9) 9
49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003) 9
Colo. Rev. Stat. (2004):
§ 18-1.3-501(1) 2
§ 18-3-204 2
Ind. Code § 35-50-3-2 (2004) 13
Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 2006) 10

Statute, regulation and rule–Continued: Page

N.J. Stat. Ann. § 2C:1-4 (West 2005) 10
U.S. Sentencing Guidelines § 2L1.2, comment. (n.2) 8
Fed. R. Evid.:
Rule 609(a)(1) 8
Rule 609(c) 8

Miscellaneous:

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 10

In the Supreme Court of the United States

No. 06-930

HAROON RASHID, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the *Federal Reporter* but is reprinted in 190 Fed. Appx. 676. The decisions of the Board of Immigration Appeals (Pet. App. B) and the immigration judge (Pet. App. D) are unreported. The prior decision of the Board of Immigration Appeals (Mot. to Vacate Stay App. C)[1] is not published in the *Administrative Decisions Under Immigration & Nationality Laws* but is available at 2004 WL 2943549. The prior decision of the immigration judge (Mot. to Vacate Stay App. B) is unreported.

[1] "Mot. to Vacate Stay" refers to the motion filed by the government on December 15, 2006, to vacate the stay of petitioner's removal that previously had been granted by Justice Breyer. See note 2, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2006. The petition for a writ of certiorari was filed on November 1, 2006, and was placed on the Court's docket on January 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Pakistan who entered the United States as a legal permanent resident in 1997. Gov't C.A. Br. 4. In March 2004, he was convicted, after a jury trial, of assault in the third degree, in violation of Section 18-3-204 of the Colorado Revised Statutes. *Id.* at 5; Mot. to Vacate Stay App. B at 1. Third-degree assault in Colorado is a "class 1 misdemeanor," Colo. Rev. Stat. § 18-3-204 (2004), which is punishable by a maximum of 18 months of imprisonment, *id.* § 18-1.3-501(1). Petitioner was sentenced to 401 days in jail, 366 of which were suspended. Gov't C.A. Br. 5.

In April 2004, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner. Gov't C.A. Br. 4. It alleged that he was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), because the assault of which he was convicted was a "crime of violence" under 18 U.S.C. 16 for which the term of imprisonment was at least one year, and the offense was therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Gov't C.A. Br. 4. The term "crime of violence" is defined in 18 U.S.C. 16(b), the subsection relevant here, as "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. In his brief submitted to the immigration judge (IJ), petitioner conceded that the assault of which he was convicted is a "felony" within the meaning of 18 U.S.C. 16(b). Specifically, petitioner stated:

> The federal definition of "felony" includes an offense if it is one for which the maximum term of imprisonment authorized is, at a minimum, "more than 1 year." 18 U.S.C. Section 3559(a)(5) (1994). In Colorado, the maximum sentence for a class 1 misdemeanor is 18 months imprisonment. Section 18-1.3-501 C.R.S. Therefore, the state misdemeanor offense of assault in the third degree meets the federal definition of "felony."

Mot. to Vacate Stay App. A at 3. Petitioner argued, however, that the Colorado offense of third-degree assault is not a "crime of violence" under Section 16(b) because the state statute does not "require[] the government to prove that force was used in causing injury, or that intentional use of force was used in causing injury." *Ibid.*

The IJ agreed with petitioner that he had been convicted of a "felony," noting that, although third-degree assault is designated as a class 1 misdemeanor under state law, "the punishment available is 18 months" and the offense therefore "is considered a felony under [federal] standards." Mot. to Vacate Stay App. B at 2. The IJ nevertheless concluded that the assault was not a "crime of violence," because it did not satisfy the other requirements of Section 16(b). *Id.* at 2-3. The IJ therefore ruled that the charge of removability had not been sustained. Mot. to Vacate Stay App. B.

DHS appealed, and the Board of Immigration Appeals (BIA) reversed. Mot. to Vacate Stay App. C. The

BIA noted in its decision that the IJ had apparently found petitioner's offense "to be a felony under federal law since it carried a possible sentence of 18 months." *Id.* at 2. Relying on the record of conviction, however, the BIA held that the IJ had erred in concluding that the assault did not otherwise satisfy the requirements of Section 16(b). *Id.* at 2-3.

On remand, the IJ ordered petitioner removed to Pakistan. Pet. App. D. Petitioner then appealed to the BIA. In his brief, he argued that he did not have the requisite mens rea for a "crime of violence," Mot. to Vacate Stay App. D at 1-2, but again conceded that the Colorado offense of which he was convicted "meets the federal definition of 'felony,'" *id.* at 1. The BIA dismissed the appeal. Pet. App. B.

3. Petitioner filed a petition for review in the court of appeals, claiming that the assault of which he was convicted was not a "crime of violence." He made a number of arguments in support of that claim, but, consistent with his position before the agency, he did not argue that the offense was not a "felony" under 18 U.S.C. 16(b). Pet. C.A. Br. 19-31; Pet. C.A. Reply Br. 10-25.

The court of appeals rejected petitioner's claim, and denied the petition for review, in an unpublished per curiam opinion. Pet. App. A. In holding that the assault was a "crime of violence" under Section 16(b), the court reasoned that the jury instructions in the criminal case were such that the guilty verdict necessarily reflected a finding that the crime involved a substantial risk that petitioner would use physical force against the victim. *Id.* at 5-6. In a footnote, the court observed that the BIA had "characterized the [assault] conviction as a fel-

ony under federal law" and that petitioner "does not challenge this ruling." *Id.* at 3 n.2.[2]

ARGUMENT

Petitioner contends (Pet. 3-8) that the assault of which he was convicted is not a "felony" under 18 U.S.C. 16(b) because, even though it is punishable by a maximum of 18 months of imprisonment, it is classified as a misdemeanor under state law. That contention was not administratively exhausted; it was not pressed or passed upon in the court of appeals; it is without merit; and it is not the basis of a circuit conflict. Further review is therefore unwarranted.

1. Under 8 U.S.C. 1252(d)(1), "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The courts of appeals have uniformly held that an alien challenging an order of removal is required to exhaust particular issues in the administrative process. That is, an alien must not only appeal to the BIA before seeking judicial review, he must raise before the BIA every claim that he wishes to be consid-

---

[2] After denying the petition for review, the court of appeals granted petitioner a stay of deportation pending the disposition of his certiorari petition. Stay Appl. Attach 2. The court subsequently vacated the stay, however, Stay Appl. Attach 3, on the ground that the certiorari petition "seeks review of matters that petitioner failed to preserve in earlier proceedings," *id.* at 1. Petitioner then applied for a stay from this Court. Justice Breyer granted the application and entered a stay of deportation pending the disposition of the certiorari petition (or, in the event that certiorari is granted, the judgment on the merits). No. 06A557 (Dec. 6, 2006). The government has filed a motion to vacate the stay. That motion has been fully briefed and is still pending.

ered by the reviewing court.[3] Indeed, with the exception of the Second Circuit, see *Zhong* v. *United States Dep't of Justice*, 461 F.3d 101, 131-132 (2006) (Kearse, J., dissenting), the courts of appeals have uniformly treated the requirement of issue exhaustion in removal cases as not only mandatory but jurisdictional.[4]

Far from having raised before the agency the claim that he raises in his certiorari petition, petitioner affirmatively conceded both before the IJ and before the BIA that the Colorado offense of which he was convicted "meets the * * * definition of 'felony'" in 18 U.S.C. 16(b). Mot. to Vacate Stay App. A at 3; *id.* App. D at 1. He has therefore failed to exhaust administrative remedies, and there is accordingly a statutory bar to judicial review of the claim. For that reason alone, certiorari should be denied.

---

[3] See, *e.g.*, *Berrio-Barrera* v. *Gonzales*, 460 F.3d 163, 167 (1st Cir. 2006); *Foster* v. *INS*, 376 F.3d 75, 78 (2d Cir. 2004) (per curiam); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Gandziami-Mickhou* v. *Gonzales*, 445 F.3d 351, 359 n.2 (4th Cir. 2006); *Wang* v. *Ashcroft*, 260 F.3d 448, 452-453 (5th Cir. 2001); *Sterkaj* v. *Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *Capric* v. *Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004); *Alyas* v. *Gonzales*, 419 F.3d 756, 762 (8th Cir. 2005); *Zara* v. *Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

[4] On January 17, 2007, the Second Circuit denied the government's petition for rehearing en banc in *Zhong*, *supra*, the case that held that issue exhaustion is not a jurisdictional requirement. At the same time, however, the panel amended its opinion to clarify the scope of its decision: "[I]n holding that, though not jurisdictional, issue exhaustion is mandatory, the [panel] majority expects that virtually no case will be decided differently from the way it would be were the requirement deemed jurisdictional." *Zhong* v. *United States Dep't of Justice*, No. 02-4882, slip op. 3 n.1.

2. Quite apart from the failure to satisfy the requirement of 8 U.S.C. 1252(d)(1) by raising the issue before the BIA, petitioner did not raise in the court of appeals the claim that he raises in his certiorari petition, see Pet. C.A. Br. 19-31; Pet. C.A. Reply Br. 10-25, and the court of appeals did not decide that claim. The court merely noted that the BIA had "characterized the [assault] conviction as a felony under federal law" and that petitioner "does not challenge this ruling." Pet. App. A at 3 n.2. This Court's "traditional rule * * * precludes a grant of certiorari," absent exceptional circumstances, "when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quoting *id.* at 58 (Stevens, J., dissenting)); see, *e.g.*, *Evans* v. *Chavis*, 126 S. Ct. 846, 854 (2006); *Clingman* v. *Beaver*, 544 U.S. 581, 598 (2005); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). And petitioner points to no "exceptional circumstances," *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004), that would justify a deviation from that traditional rule in this case.

3. The contention raised in the certiorari petition is in any event without merit. As explained below, an offense punishable by more than one year of imprisonment is a "felony" under 18 U.S.C. 16(b), even if it is classified as a "misdemeanor" under state law.

a. Title 18 of the United States Code contains no specific definition of "felony." When a word is not defined by statute, however, courts "normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). Longstanding usage of the term "felony" in Title 18 focuses, not on the label placed on the crime, but on the "severity

of the punishment" imposed by the convicting jurisdiction. *Jerome* v. *United States*, 318 U.S. 101, 108 n.6 (1943). Throughout Title 18, unless otherwise indicated, the term "felony" has been understood to refer to a crime punishable by death or imprisonment for more than one year. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).[5] Indeed, until 1984, Congress specifically defined "felony" in Title 18 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. 1(1) (1982). In 1984, Congress replaced that provision with 18 U.S.C. 3559, which, while lacking a specific definition, continues to classify all federal criminal offenses for sentencing purposes based on the length of the "maximum term of imprisonment authorized" and to make any offense for which the authorized penalty is more than one year of imprisonment a felony. 18 U.S.C. 3559(a); see also Sentencing Guidelines § 2L1.2, comment. (n.2) (defining "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year").

---

[5] Accord *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States* v. *Urias-Escobar*, 281 F.3d 165, 167 (5th Cir.) ("federal law traditionally defines a felony as a crime punishable by over one year's imprisonment") (emphasis omitted), cert. denied, 536 U.S. 913 (2002); *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir.) ("The one-year mark was used by Congress as early as 1865."), cert. denied, 528 U.S. 845 (1999); *United States* v. *Burston*, 159 F.3d 1328, 1335 n.13 (11th Cir. 1998) (the "traditional definition of a felony" is an offense "punishable by death or imprisonment in excess of one year") (quoting Fed. R. Evid. 609(a)(1) and (c)); *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) ("felony" has "long been defined as 'any offense punishable by death or imprisonment for a term exceeding one year' ") (quoting 18 U.S.C. 1(1) (1982)).

The longstanding definition of "felony" is repeated, either in terms or in substance, throughout the United States Code.[6]

Courts are thus properly "reluctant to infer, absent a clear indication to the contrary, that Congress intended to abandon its long-established practice of using the term 'felony' to describe offenses punishable by more than one year's imprisonment." *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002). There is no such indication to the contrary, much less a *clear* indication to the contrary, in 18 U.S.C. 16(b). Instead, all indications are that Congress did *not* intend that the determination of whether a person has been convicted of a "crime of violence" under Section 16(b) would turn on whether a crime punishable by more than one year in prison happened to be called a "felony" or a "misdemeanor" by the convicting jurisdiction.

First, defining "felony" by reference to the maximum punishment authorized for an offense under the law of the convicting jurisdiction provides a level of uniformity by preventing the federal consequences of a state-law conviction from turning upon varying nomenclature. See *Small* v. *United States*, 544 U.S. 385, 393 (2005); cf. *Lopez* v. *Gonzales*, 127 S. Ct. 625, 633 (2006) (rejecting interpretation of 8 U.S.C. 1101(a)(43)(B) that would result in "state-by-state disparity"). Second, by identifying the offenses covered by Section 16(b) as felonies, Congress obviously wanted to ensure that crimes of a particular degree of seriousness were included, and the maximum term of imprisonment is a far more reliable

---

[6] See, *e.g.*, 7 U.S.C. 2024(b)(1) and (c); 18 U.S.C. 751(a), 922(g)(1), 924(e)(2)(B), 3156(a)(3), 3592(c)(2) and (10); 21 U.S.C. 802(44); 22 U.S.C. 2714(e)(3); 28 U.S.C. 540A(c)(1); 29 U.S.C. 186(d)(1) and (2); 49 U.S.C. 31301(9); 49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003).

indicator of a crime's seriousness than whether it happens to be labeled a "felony" or a "misdemeanor" by the State. Third, inasmuch as two States eschew the felony-misdemeanor distinction altogether, see N.J. Stat. Ann. § 2C:1-4 (West 2005); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 2006), mere labels would not always suffice for categorizing an offense as a "crime of violence" under 18 U.S.C. 16(b). Fourth, reliance on the felony/ misdemeanor label would be particularly unsuitable under the aggravated-felony provision, because that provision attaches consequences to foreign as well as to state (and federal) crimes. 8 U.S.C. 1101(a)(43) (final paragraph).

b. Petitioner relies heavily (Pet. 6-7) on the Third Circuit's decision in *Francis* v. *Reno*, 269 F.3d 162, 166-171 (2001), which held that the label employed by the convicting jurisdiction determines whether a person has been convicted of a "felony" for purposes of 18 U.S.C. 16(b), regardless of the maximum term of imprisonment. The principal justification for the decision in *Francis* was that interpreting "felony" in 18 U.S.C. 16(b) to mean an offense punishable by a prison term of more than one year would render redundant the language in 8 U.S.C. 1101(a)(43)(F) providing that a "crime of violence" (as defined in 18 U.S.C. 16) is an "aggravated felony" only if "the term of imprisonment [is] at least one year." 269 F.3d at 170; see Pet. 7. That reasoning is flawed, for three fundamental reasons.

First, the "felony" limitation in 18 U.S.C. 16 appears only in subsection (b) of that provision. Under subsection (a), *any* offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" is a "crime of violence," 18 U.S.C. 16(a), whether it is "a felony or a misdemeanor," S. Rep. No. 225, 98th Cong., 1st Sess.

307 (1983). The at-least-one-year-of-imprisonment language in 8 U.S.C. 1101(a)(43)(F) therefore imposes an important limitation on the "crimes of violence" under 18 U.S.C. 16(a) that qualify as "aggravated felonies."

Second, classifying an offense as a "crime of violence" under either subsection of 18 U.S.C. 16 has a variety of consequences outside the immigration context. For example, Congress has criminalized certain conduct undertaken in the course of committing a crime of violence;[7] it has criminalized certain conduct undertaken by someone who has been convicted of a crime of violence;[8] and it has criminalized certain conduct that has as an element the commission, attempted commission, or intended commission of a crime of violence.[9] In those contexts, 8 U.S.C. 1101(a)(43)(F) has no application at all, and thus the language in that provision on which the Third Circuit relied could not render the term "felony" redundant even when 18 U.S.C. 16(b) is applied in those contexts.

Third, the "felony" limitation in 18 U.S.C. 16(b) refers to the sentence that was authorized by law, whereas the condition in 8 U.S.C. 1101(a)(43)(F) that "the term of imprisonment [is] at least one year" refers to the sentence that was actually imposed, see *United States* v.

---

[7] See 15 U.S.C. 1245(b) (possession or use of ballistic knife); 18 U.S.C. 25(b) (Supp. IV 2004) (use of minor).

[8] See 18 U.S.C. 931(a) (Supp. IV 2004) (possession of body armor).

[9] See 18 U.S.C. 842(p) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction); 18 U.S.C. 521(c)(2) (criminal street gangs); 18 U.S.C. 1952(a) (travel in aid of racketeering); 18 U.S.C. 1956(a) (money laundering); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2261(a) (interstate domestic violence); 21 U.S.C. 841(b)(7)(A) (distribution of controlled substance).

Pacheco, 225 F.3d 148, 153-154 (2d Cir. 2000), cert. denied, 533 U.S. 904 (2001); *Alberto-Gonzalez* v. *INS*, 215 F.3d 906, 909-910 (9th Cir. 2000); *United States* v. *Graham*, 169 F.3d 787, 789-791 (3d Cir.), cert. denied, 528 U.S. 845 (1999).[10] The two limitations thus have independent functions. Nor are all the crimes covered by each limitation necessarily subsumed in the category of those covered by the other. As explained above, a "felony" under federal law is an offense for which the authorized term of imprisonment is *more than* one year, whereas the condition in 8 U.S.C. 1101(a)(43)(F) is that the term actually imposed is "*at least*" one year. The latter condition would be satisfied, but the former would not, if the alien was convicted of an offense that carried a maximum sentence of one year of imprisonment and was sentenced to the one-year statutory maximum. Conversely, the former condition would be satisfied, but the latter would not, if the alien was convicted of an offense that carried a maximum sentence of more than one year and was sentenced to a term of less than one year.

4. Petitioner asserts (Pet. 6) that the Fifth, Seventh, and Ninth Circuits have also addressed the question presented in the petition and have come to the same conclusion as the Third Circuit in *Francis*. That assertion is mistaken. The Fifth and Ninth Circuits have expressly declined to address the question presented here, on the ground that the crime at issue was not a "felony"

---

[10] That condition was satisfied here, because petitioner was sentenced to a term of imprisonment of 401 days. Gov't C.A. Br. 5. That is true even though part of the sentence was suspended, *ibid.*, because "term of imprisonment" in the statute means "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment * * * in whole or in part," 8 U.S.C. 1101(a)(48)(B).

under any conceivable definition of the term. See *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 883-885 (5th Cir. 2006); *Ortega-Mendez* v. *Gonzales*, 450 F.3d 1010, 1015 (9th Cir. 2006). The Seventh Circuit decision on which petitioner relies, *Flores* v. *Ashcroft*, 350 F.3d 666 (2003), likewise had no occasion to address the question, because the crime at issue there—a Class A misdemeanor—was not punishable by more than one year in prison, see Ind. Code § 35-50-3-2 (2004).[11]

Petitioner also asserts (Pet. 5-6) that the Second, Fourth, Sixth, Tenth, and Eleventh Circuits have addressed the question presented in the petition and have reached a different conclusion than the Third Circuit in *Francis*. That assertion is also mistaken. The cases on which petitioner relies addressed an entirely distinct question: whether a misdemeanor can be an "aggravated felony" under the immigration laws if it otherwise satisfies the applicable definition. (Each case holds that it can.) See *Pacheco*, 225 F.3d at 154-155; *Wireko* v. *Reno*, 211 F.3d 833, 835-836 (4th Cir. 2000); *United States* v. *Gonzales-Vela*, 276 F.3d 763, 766-768 (6th Cir. 2001); *United States* v. *Saenz-Mendoza*, 287 F.3d 1011, 1013-1015 (10th Cir.), cert. denied, 537 U.S. 923 (2002); *United States* v. *Christopher*, 239 F.3d 1191, 1193-1194 (11th Cir.), cert. denied, 534 U.S. 877 (2001).[12]

---

[11] The other Third Circuit decision cited by petitioner (Pet. 6) simply followed *Francis*'s holding that 18 U.S.C. 16(b) "relies on the state's grading of [an] offense to determine whether it is a 'felony.'" *Singh* v. *Gonzales*, 432 F.3d 533, 538 (2005).

[12] The other court of appeals decisions cited by petitioner (Pet. 6) addressed the same question (and reached the same conclusion). See *Graham*, 169 F.3d at 791-793; *United States* v. *Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.), cert. denied, 536 U.S. 913 (2002); *Guerrero-Perez* v. *INS*, 242 F.3d 727, 730-737 (7th Cir. 2001); *United States* v. *Gonzalez-*

Francis, therefore, is the only court of appeals decision cited by petitioner (and the only one of which we are aware) that has addressed the question whether a crime punishable by more than one year of imprisonment is a "felony" under 18 U.S.C. 16(b) if it is classified as a "misdemeanor" under state law. See also note 11, *supra* (noting that Third Circuit followed *Francis* in *Singh*). And although *Francis* incorrectly answered that question no, the decision below (which in any event is unpublished) does not conflict with *Francis*, because the Tenth Circuit was not asked to, and did not, decide that question in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
Attorney

JANUARY 2007

Tamariz, 310 F.3d 1168, 1170-1171 (9th Cir. 2002), cert. denied, 538 U.S. 1008 (2003).

(3)

No. 06-930

Supreme Court, U.S.
FILED
FEB 14 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HAROON RASHID,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Andrew B. Reid
Attorney for Haroon Rashid
1439 Court Place
Denver, Colorado 80202
Telephone: 303.825.5400
Facsimile: 303.623.2101
Email: areid@waltergerash.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i
ARGUMENT 1
THE QUESTION WAS PRESERVED BELOW 1
RESPONDENT MISSTATES THE QUESTION
BEFORE THE COURT 3
SECTION 16(b) EXCLUDES MISDEMEANORS 5
CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003).....5
Francis v. Reno, 269 F.3d 162 (3rd 2001).....5,6
Lopez v. Gonzales, 127 S.Ct. 625 (2006) 9
Rashid v. Gonzales, 2006 WL 2171522 (10th Cir. 2006).....1,3,4
Sing v. Gonzales, 432 F.3d 533 (3rd 2006).....5-6
Sing v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004).....5
United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003) ...2,7-8
United States v. Ponce-Casalez, 212 F.Supp.2d 42
(D.R.I. 2002) 6-7

FEDERAL STATUTES & REGULATIONS

8 U.S.C. section 1252(b)(1).....3
8 U.S.C. section 1101(a)(43)(F).....4,5,7
8 U.S.C. section 1227(a)(2)(A)(iii).....4,5
18 U.S.C. section 16.....1-8
18 U.S.C. section 3156(a)(4) 7
18 U.S.C. section 3559(a)(5) 1-3,4

OTHER

S.Rep. No. 98-225 7-8
D.C.Code § 23-1331 (1981) 7-8

ARGUMENT

I. THE QUESTION WAS PRESERVED BELOW

The Respondent's Brief first contends that the question raised by the Petition was not properly preserved below. Referring to its argument in its Motion to Vacate Stay, the Government at pages 5 and 6 of its Brief substantively confuses the position the Petitioner's stated to the Immigration Judge on the definition of a "felony" under "***18 U.S.C. § 3559(a)(5)***" with the Petitioner's position on the definition of an "***aggravated*** felony" under 18 U.S.C. § 16(b) which was used as the legal basis for deportation. *See*, *Rashid v. Gonzales*, 190 Fed.Appx. 676, 679-80, 2006 WL 2171522, *2-3 (10th Cir. 2006). The Government refers to Petitioner's trial brief wherein Petitioner notes that the one-year sentence meets the definition of "felony" under 18 U.S.C. § 3559(a)(5). Petitioner was merely responding to the Government's contention that the crime was technically a felony under that statute - but not necessarily under 18 U.S.C. § 16(b).

There is no concession there or anywhere in the prior proceedings that the definition of a "felony" under 18 U.S.C. § 3559(a)(5) is the equivalent of an "aggravated felony" under 18

U.S.C. § 16(b). To the contrary, following the acknowledgement that the possible one-year sentence met the definition under Section 3559(a)(5), Petitioner argued to the Immigration Judge as follows:

> In United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003), the Tenth Circuit noted that 16(b) was enacted as part of the Comprehensive Crime Control Act of 1984. The Senate Report on the laws explain that the crimes of violence are meant to include "essentially the same ***categories of offenses*** described in the District of Columbia Code." The reference to the D.C. Code provisions defined crimes of violence did not include the offense of simple assault.

See, Motion to Vacate, App. A, 3 (emphasis supplied). The identical argument was made by Petitioner before the Board of Immigration Appeals. *See*, Motion to Vacate, App. C, 3-4.

In other words, Petitioner argued below that the offense of simple assault was "*categorically*" excluded from the definition of an "aggravated felony" under section 16(b). That is the very same issue raised here by Petitioner by this Petition for Writ of Certiorari.

The Government also asserts at pages 4-5 and 7 of its Brief that this question was not preserved in the Tenth Circuit appeal, referring to a footnote in that decision:

> FN2. Pursuant to the [state] statute, this crime is a class 1 misdemeanor, but **because Mr. Rashid was sentenced to 401 days' incarceration**, ...the BIA characterized the conviction as a felony under

> federal law. Mr. Rashid does not challenge this ruling.

Rashid v. Gonzales, 190 Fed.Appx. 676, 678 n.2, 2006 WL 2171522, **2, n. 2 (emphasis supplied). There, the Circuit Court is again referring to the BIA's use of the definition of a "felony" under 18 U.S.C. § 3559(a)(5), defined merely in terms of the maximum potential sentence of more than 1 year. The footnote is ***not*** referring to the definition of "aggravated felony" in 18 U.S.C. § 16(b).

The section 16(b) issue has not been waived and is *a priori* subsumed in the decision of the Court of Appeals when it specifically held that the simple misdemeanor assault fell within the definition of 18 U.S.C. § 16(b) and was an "aggravated felony" and a deportable offense. *Rashid*, 2006 WL 2171522 at **2 and **3.

II. RESPONDENT MISSTATES THE QUESTION BEFORE THE COURT

The Government misstates the question before this Court as: "whether an offense is a 'felony' under [18 U.S.C. 16(b)] if, although it is punishable more than one year of imprisonment, is classified as a 'misdemeanor' under state law." Respondent's Brief, page I. That is ***not*** the question before the Court. Rather, the Question presented by the Petition is whether a state misdemeanor

offense is "an '***aggravated felony***' for the purposes of deportation under Section 237(a)(2)(iii) of the Immigration and Naturalization Act, 8 U.S.C. § 1227(a)(2)(A)(iii)." Petition, page i.

The crucial difference in the way the Question is phrased by the each party is that Section 1227(a)(2)(A)(iii), does not refer to the general federal definition of a "felony" found at 18 U.S.C. § 3559(a)(5), but instead gives its own definition of an "aggravated felony" at 8 U.S.C. § 1101(a)(43)(F). There, an "aggravated felony" is defined as "***a crime of violence*** (as defined in section 16 of Title 18 ...) for which the term of imprisonment is ***at least one year*** ...." (emphasis supplied). The definition of an "aggravated felony" under Section 1101(a)(43)(F) has two requirements: (1) it must be defined as a crime of violence under 18 U.S.C. § 16; and (2) it must have a term of imprisonment of at least one year.

An "aggravated felony" under Section 1101(a)(43)(F) is not the equivalent of a "felony" under Section 3559(a)(5). An offense is by definition *not* an aggravated felony if it is not a "crime of violence," even if it has a term of imprisonment of at least one year. The issue here, then, is not whether the state misdemeanor is a "felony" under the general federal felony definition, as the

Government would have it, but whether the offense is a "crime of violence" as defined by 18 U.S.C. § 16. Or, more narrowly, whether the offense is a "crime of violence" under subsection (b).

III. SECTION 16(b) EXCLUDES MISDEMEANORS

The majority of the Government's argument in response to the Petition is an attempt to isolate the Third Circuit's decision in *Francis v. Reno*, 269 F.3d 162, 166-171 (3rd Cir. 2001). The irony in this effort is that *Francis* made the most in-depth and well-reasoned examination of section 16(b) misdemeanor issue, including a full look at the legislative history of the provision, by any court to date.

The Government's assertion that the Third Circuit stands alone on this question is simply not correct. The Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666, 669 (2003), expressly held: "Because the offense of which Flores was convicted is a misdemeanor, only § 16(a) matters." Contrary to the Government's assertion, the length of sentence was not a factor in the Seventh Circuit's ruling dispensing section 16(b). *Id.* In *Singh v. Ashcroft*, 386 F.3d 1228, 1231, n. 3 (2004), the Ninth Circuit similarly ruled that an offense was excluded as an "aggravated felony" under section 16(b) because it was a state misdemeanor.

Recently, the Third Circuit in *Sing v. Gonzales*, 432 F.3d 533, 538 (2006) strongly reaffirmed the analysis in *Francis*. There, the Circuit Court noted that section 16(b) "relies on the state's grading of the offense to determine whether it is a 'felony'." *Id.* "Congress was obviously aware of the definition of 'felony' varies from jurisdiction to jurisdiction, and it could certainly have defined an 'aggravated felony' under the INA to include any state offense that would be classified as a felony under federal law. It did not do so." *Francis*, 260 F.3d at 169.

It is beyond dispute that Congress intended only the more serious felonies to fall within the definition of "aggravated felony."

> The Court also notes that the INA's legislative history casts doubt on whether Congress intended that misdemeanor simple assault offenses be encompassed in the definition of "aggravated felony." Initially, "aggravated felony" was defined as "murder, any drug trafficking crime as defined in [18 U.S.C. § 924(c)(2)], or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States." Subsequently, the definition of "aggravated felony" was expanded to refer to other felony offenses including "any crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." In view of the 5-

> year minimum sentence requirement, it was axiomatic that all "crimes of violence" falling within the ambit of 8 U.S.C. § 1101(a)(43)(F) were serious felonies. …In sum, the legislative history of 8 U.S.C. § 1101(a)(43) reveals an intent by Congress to widen the range of serious offenses qualifying as aggravated felonies. That intent is highlighted by Congress' expansion of 8 U.S.C. § 1101(a)(43)(F) to include crimes of violence for which the term of imprisonment was at least one year. However, although those circuit courts of appeal which have considered the matter have concluded to the contrary, this Court is not convinced that Congress intended to expand the definition of "aggravated felony" to include the type of misdemeanor offense [*simple assault*] for which defendant was convicted.

United States v. Ponce-Casalez, 212 F.Supp.2d 42, 45-6 (D.R.I. 2002) (citations and footnotes omitted).

Similarly, as argued by the Petitioner below the legislative history of section 16(b) also discloses Congress's intent that the term "crime of violence" apply only to more serious felonies and offenses.

> Legislative history confirms that Congress meant its definition to align with the everyday meaning of the term. Section 16(b) was enacted as part of the Comprehensive Crime Control Act of 1984. That statute also included …a definition of "crime of violence" substantially identical to § 16. *See id.* sec. 203(c), § 3156(a)(4), 98 Stat. at 1985 (codified as amended at 18 U.S.C. § 3156(a)(4)). The Senate Report on the legislation explains that the crimes of violence and other serious crimes that make a hearing mandatory are meant to include "essentially the same categories of offenses described in the

> District of Columbia Code by the terms 'dangerous crime' and 'crime of violence' for which a detention hearing may be held under that statute." S.Rep. No. 98-225, at 20-21 & n. 60, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203-04.
>
> The referenced D.C.Code provisions defined crimes of violence to include the following: murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses. D.C.Code § 23-1331(4) (1981) (most recently amended 2002). Dangerous crimes included taking property by force, certain kinds of burglary, certain kinds of arson, forcible rape, assault with intent to rape, and some drug offenses. *Id.* § 23-1331(3) (most recently amended 2001).

United States v. Lucio-Lucio, 347 F.3d 1202, 1204-5 (10th Cir. 2003) (footnote omitted). Tellingly, simple assault is not considered a "crime of violence" under the D.C.Code. *Id.*[1]

CONCLUSION

Mr. Rashid entered this country legally and has resided here

[1] The list now includes "aggravated assault" and "assault with a dangerous weapon", for example, but not simple assault. D.C.Code § 23-1331(4). It also includes "any of the *foregoing offenses* as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year," but does not include simple assault even if the offense is punishable for more than one year as it is not one of the "foregoing offenses." D.C.Code § 23-1331(4)(Q).

as a lawful permanent resident with his American wife and four American-born children for 10 years. He has been held in custody for 3 of those years while the Government has sought to deport him as an aggravated felon for a first offense state simple misdemeanor assault in which the trial court ordered only 35 days actual jail time. The offense arose out of an incident in which *he* was being harassed by a gang of youths for his ethnic dress and became involved in a fight with one of them which resulted in minor scrapes and bruises. *See*, Emergency Motion for Stay of Deportation, Attachment 5, ¶s 2 and 5 and Response to Motion to Vacate Stay, Attachment 6. There were no significant let alone serious injuries, no weapons were involved. There was nothing "aggravated" in the simple assault offense.

The Court recently noted the overreaching of the Government in extending the definition of "aggravated felony" to relatively minor offenses in deportation matters. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). Congress intended that the extreme remedy of deportation of persons lawfully in the United States be reserved to serious offenses.

There is a clear conflict among the circuits on this issue. Not

only would justice be well served in this instance, but an important issue of law which will arise frequently in the future can be settled by the acceptance of certiorari.

ANDREW B. REID
Attorney for Petitioner Haroon Rashid

February 2007